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No. 543

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

VITO GENOVESE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Reasons for granting the writ	5
Conclusion	8
Appendix	1a

CITATIONS

CASES:

Barry v. *Hall*, 98 F. (2) 222 (C.C.A.D.C., 1938)	6
Baumgartner v. *United States*, 322 U.S. 665	6
Cufari v. *United States*, 217 F. (2) 404 (C.C.A. 1, 1954)	7
Knauer v. *United States*, 328 U.S. 654	6
Masters v. *United States*, 229 F. (2) 677 (C.C.A. 6, 1956)	6
Schneiderman v. *United States*, 320 U.S. 118, 158	6
United States v. *Barnette*, 91 F. (2) 10 (C.C.A. 5, 1937)	6
United States v. *Bischof*, 48 F. (2) 538, 539 (C.C.A. 2, 1931)	7

STATUTES:

Immigration and Nationality Act, Section 340(a), 66 Stat. 260	4
Nationality Act of 1940, Section 338(a), 8 U.S.C. 738(a)	3

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit denying a timely petition to rehear its order which affirmed an order of the District Court denaturalizing petitioner.

OPINIONS BELOW

The Court of Appeals denied our petition to rehear without opinion. Its opinion affirming the District Court's order of denaturalization is not yet reported, but is printed as the appendix to this petition. The District Court's opinion, reported at 133 F. Supp. 820, is set forth at R. 11a-32a.

JURISDICTION

The judgment of the Court of Appeals denying our petition to rehear was entered September 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner was naturalized as a citizen of the United States some twenty years ago in 1936. Respondent seeks to take away his citizenship on the asserted ground that petitioner in the course of his naturalization was asked about arrests and falsely denied ever being arrested. Both naturalization examiners who interviewed petitioner prior to his becoming a citizen in 1936 are dead. At the trial in this proceeding, petitioner admitted a record of arrests but denied under oath that he had been asked about arrests in his naturalization proceeding. One of his naturalization witnesses, a municipal judge testified in petitioner's behalf and confirmed that no question concerning arrests had been asked. Petitioner and the judge were the only direct witnesses alive and locatable after twenty years. In addition, four character witnesses, all reputable citizens in petitioner's community, attested petitioner's good reputation for truth and veracity. The only testimony supporting the denaturalization of petitioner is that of a naturalization examiner who admittedly had nothing to do with petitioner's naturalization. He testified that a regulation required inquiry concerning arrests, and that in practice symbols found on petitioner's application were not placed on an application unless such inquiry had been made and negatively answered. On these undisputed facts, the following questions are presented:

1. Did respondent prove its case for taking away citizenship by clear, unequivocal, and convincing evidence which does not leave in doubt the issue of whether petitioner was asked concerning arrests; or, putting the same question somewhat more broadly, can a citizen of the United States lose his citizenship on an inference based on a presumption of regularity arising from testimony as to rule and practice.

2. Assuming that petitioner was asked about arrests and falsely denied having been arrested, would such denial constitute fraud warranting denaturalization when in fact the revealing of his criminal record would not have barred him from naturalization.

3. Assuming that petitioner was asked about arrests and falsely denied having been arrested, can such denial, even though not material in inducing a grant of citizenship, be taken now to show a lack of good moral character at the time of naturalization and thus warrant the taking away of citizenship as illegally procured.

STATUTE INVOLVED

Section 338(a) of the Nationality Act of 1940 [8 U.S.C. 738(a)] provides as follows:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavits showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such persons to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

STATEMENT

This is a denaturalization proceeding initiated by respondent under Section 338(a) of the Nationality Act of 1940. The provisions of that section have been substantially carried over into our present law, the Immigration and Nationality Act, Section 340(a), 66 Stat. 260.

Petitioner was naturalized as a citizen of the United States in 1936, R. 2a. Respondent's complaint (R. 2a-6a), filed in 1952, seeks, so far as now material, to take away that citizenship on allegations that petitioner in the course of his naturalization had been asked concerning arrests and had falsely denied having any arrest. Petitioner by sworn answer (R. 8a) and sworn testimony at the trial in the District Court (R. 222a-223a) denied that he had been asked concerning arrests. In his testimony, petitioner admitted having had a criminal record which, as is undisputed, would not have barred him from naturalization had it been known. R. 223a, 25a. One of his witnesses at naturalization, a municipal judge, confirmed that petitioner was not asked concerning arrests, R. 272a, 273a, 276a, and 284a-285a. Four citizens, all reputable and qualified witnesses, attested petitioner's good reputation for truth and veracity. R. 285a, 291a, 294a, and 296a.

The respondent's reliance was solely on symbols on petitioner's application form, plus the statement of a naturalization examiner, unconnected with the questioning of petitioner at naturalization, that a regulation required inquiry concerning arrests and that the type of symbols found on petitioner's application form would not, in practice, have been placed on a

form unless inquiry concerning arrests had been made and a negative answer obtained. R. 44a.

The District Court found that the respondent had "sustained its burden by clear, unequivocal and convincing proof" (R. 22a) that petitioner had been asked concerning arrests and had falsely denied having been arrested. The fact that petitioner's criminal record would not have barred naturalization, even if known, did not, in the opinion of the District Court, prevent denaturalization for fraud (R. 23a-26a). The Court was of the further opinion that petitioner's naturalization should be taken away as illegally procured because a false denial of arrests, even though not material, shows a lack of the good moral character requisite for naturalization (R. 27a-R. 28a).

The Court of Appeals (see its opinion in the appendix to this petition) recited that it "should affirm only if the [record contains] clear, unequivocal, and convincing evidence which does not leave the issues of fraud or illegality in doubt," and with little discussion of the facts approved the District Court on all grounds.

A petition to rehear en banc was denied.

REASONS FOR GRANTING THE WRIT

1. The Court Below Decided the Federal Question of Petitioner's Denaturalization in a Way in Conflict With Applicable Decisions of This Court, and Its Decision Is in Conflict With Decisions of the First and Second Circuit Courts of Appeal

This Court exacts an extremely heavy burden of proof from the Government as requisite for the degrading of a citizen to the status of an alien. Denaturalization must be based on "clear, unequivocal,

and convincing evidence which does not leave the issue in doubt." See *Schneiderman* v. *United States,* 320 U.S. 118, 158; *Baumgartner* v. *United States,* 322 U.S. 665, and *Knauer* v. *United States,* 328 U.S. 654. The imposition of such a burden in securing denaturalization can hardly allow of a denaturalization of your petitioner that rests only on an inference based on a presumption of regularity. Testimony as to rule and invariable practice does not suffice to establish the happening of an event even in civil actions where only a preponderance of the evidence is required. See, for example, *Masters* v. *United States,* 229 F. (2) 677 (C.C.A. 6, 1956); *Barry* v. *Hall,* 98 F. (2) 222 (C.C.A.D.C., 1938); *United States* v. *Barnette,* 91 F. (2) 10 (C.C.A. 5, 1937). And to presume that a Government employee (or any employee, or anyone, for that matter) always did what he was supposed to do is to ignore experience.

The Court of Appeals correctly states the *Schneiderman-Baumgartner-Knauer* rule on the burden of proof for denaturalization. Yet its decision allows the denaturalization of petitioner on the basis that petitioner must have been asked concerning arrests because, as one naturalization examiner testified, that is what the regulation required and that is what was always asked. The sworn testimony of two direct witnesses (petitioner and the municipal judge who was at his naturalization examination) and the four witnesses attesting petitioner's truth and veracity availed not—even for raising a doubt on the issue whether petitioner was asked concerning arrests. The decision of the Court of Appeals, so based, cannot reasonably be squared with *Schneiderman, Baumgartner,* and *Knauer.* The First Circuit Court of Appeals on

facts not materially different from ours could not find that the Government had carried its burden of showing that the question concerning arrests had been asked when there was nothing to oppose the Government's testimony of regular practice, except the citizen's statement of "no recollection of being asked about arrests." *Cufari* v. *United States,* 217 F. (2) 404 (C.C.A. 1, 1954). The decision of the Court of Appeals here conflicts directly and squarely with the decision of the First Circut Court of Appeals in *Cufari.* If both decisions continue to stand, Cufari will remain a citizen and Genovese will be an alien subject to risk of deportation because Cufari lives in Massachusetts in the First Circuit and Genovese in New Jersey in the Third, all other circuits in the United States being, as yet, neutral on the point. In avoidance of precisely such unseemly results does the writ of certiorari lie.

On another issue, the decision of the Court of Appeals conflicts with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Bischof,* 48 F. (2) 538, 539, (C.C.A. 2, 1931). Here (in the Court of Appeals below) it is held that a false statement as to arrests in the course of naturalization warrants denaturalization now for lack of the good moral chacter requisite at the time of naturalization. There (in the Second Circuit) it is held in *Bischof* that the issue of good moral character is settled by the naturalization decree and cannot be reopened for the purpose of denaturalization.

2. The Court Below Decided an Important Question of Federal Law Which Has Not Been, But Should be Settled by This Court

The Court below holds that a knowingly false denial of arrests sufficies for a showing of fraud warranting denaturalization even though a truthful answer and consequent inquiry thereon would have disclosed no bar to naturalization—in other words, that fraud for denaturalization requires no showing that anyone was defrauded. A holding, so dubious even in the general law of fraud, and so broadly important in citizenship law, deserves, we suggest, the Court's review.

CONCLUSION

The Court should grant this petition in order to bring the decision below in line with its own decisions, to resolve the conflicts existing between the decision below and the decisions of the First and Second Circuits, and to settle the important question of federal law presented.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,785

UNITED STATES OF AMERICA

v.

CARMELO MONTALBANO, *Appellant.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

No. 11,790

UNITED STATES OF AMERICA

v.

VITO GENOVESE, *Appellant.*

On Appeal from the United States District Court for the District of New Jersey.

Argued April 12, 1956

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 21, 1956)

By STALEY, *Circuit Judge.*

This opinion covers two separate appeals which arose from denaturalization proceedings. In No. 11,785, appellant Carmelo Montalbano challenges the order of the District Court for the Eastern District of Pennsylvania revoking his citizenship and cancelling his certificate of naturaliza-

tion. In No. 11,790, Vito Genovese appeals from a similar order entered as to him by the District Court of New Jersey.

The sole question raised by Montalbano, and one of the questions raised by Genovese, is whether plaintiff, United States of America, sustained its burden of establishing that the respective defendants procured United States citizenship fraudulently and illegally.[1] All parties agree that the government's burden is a heavy one and this court should affirm only if the records contain clear, unequivocal, and convincing evidence which does not leave the issues of fraud or illegality in doubt. Schneiderman v. United States, 320 U.S. 118, 158 (1943); Baumgartner v. United States, 322 U.S. 665 (1944); United States v. Anastasio, 226 F.2d 912 (C.A. 3, 1955), cert. denied 351 U.S. 931 (1956).

In both cases, the government's charges rested on the alleged fact that in applying for citizenship each defendant had lied when asked whether he had ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation. There is no dispute that both Montalbano and Genovese had criminal records.[2]

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[1] Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, provided as follows:

"It shall be the duty of the United States district attorneys for the respective districts, upon affidavits showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

[2] Montalbano's criminal record is: On December 28, 1922, he was convicted at Wilmington, Delaware, of carrying concealed deadly weapons and was sentenced to pay a fine of $400; on December 17, 1928, he was convicted at Philadelphia on eleven bills of indictment charging conspiracy to extort and sentence was suspended; on February 21, 1931, he was indicted in the United

The record in the Montalbano case shows that on February 15, 1933, Montalbano filed with the Immigration and Naturalization Service his "Application for Certificate of Arrival and Preliminary Form for Petition for Citizenship" which admittedly was not prepared by anyone in the Immigration Service, but was sent in by Montalbano or by someone on his behalf and was signed by Montalbano. Question 29 on that form, which read "Have you ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation?" was answered in the negative. On March 15, 1933, Montalbano was interviewed twice under oath by Naturalization Examiners Halstead and Braden, who were called as witnesses in the district court and testified that, although they had no independent recollection of their respective interviews, the notes which they made on defendant's preliminary application and his petition for naturalization positively indicated that the defendant had told each of them that he had never been arrested.

States District Court of New Jersey on sixteen counts of transporting stolen motor vehicles in interstate commerce to which he pleaded guilty and was sentenced to five years' imprisonment (suspended) and five years' probation; on December 15, 1932, he was arrested at Newark, New Jersey, and charged with illegal possession of lottery tickets; on May 2, 1933, he was convicted in the First Criminal Court of the State of New Jersey as a disorderly person and on the charge of "no owner's license in possession" and sentenced to serve ninety days in the Hudson County Penitentiary. He is presently incarcerated in the New Jersey State Prison where he was sentenced to life imprisonment on a conviction of murder on January 7, 1943.

Genovese's criminal record shows the following arrests: April 22, 1918, felonious assault, April 25, 1924, illegal possession of weapon; May 13, 1924, homicide by auto; July 25, 1925, burglary; October 10, 1925, homicide; December 4, 1934, homicide; January 17, 1925, disorderly person; January 13, 1931, possession of concealed weapons. On all of these arrests, he was discharged. In addition, he was arrested and convicted April 15, 1917, for illegal possession of a revolver and sentenced to sixty days in the workhouse, and on January 29, 1927, he was arrested and convicted of carrying a dangerous weapon and sentenced to pay $250 fine and to serve thirty days.

The government's case against Genovese rested on similar facts. Though it is not clear who filled out his form, the same question about arrests was answered in the negative and the form was signed by him. He too was interviewed by Naturalization Examiners who made certain notations and marks on the relevant forms. These examiners were dead at the time of trial, but evidence as to the customary procedures during such interviews and the meaning of the markings and notes on the forms clearly indicated that Genovese had been explicitly asked about arrests and charges of crime and gave untruthful answers.

Both Montalbano and Genovese denied concealing past arrests or convictions. Montalbano contended that he disclosed his record but was told it did not matter unless he had "served time," while Genovese said that he had not read nor had he had read to him the question on the form about arrests and was told during oral interview that his record was of no interest since he had never been convicted of a felony. The testimony of each was rejected by the respective district courts.

We have analyzed the records closely and see no necessity for detailed outline of the logically persuasive features of the government's evidence in these cases. In both, the government adequately met the heavy burden which it faced. The records clearly justify the conclusion that each defendant deliberately concealed his criminal record and in so doing committed a fraud upon the government which supports the revocation of citizenship. United States v. Accardo, 113 F. Supp. 782, aff'd per curiam 208 F.2d 633, cert. denied 347 U.S. 952 (1954); Corrado v. United States, 227 F.2d 780 (C.A. 6, 1955).

The other basis for the revocation—that citizenship was illegally procured—needs little discussion. The law required that each defendant be a man "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order of hap-

piness of the same" for a period of five years immediately preceding his application for citizenship. Act of June 29, 1906, § 1, Fourth, 34 Stat. 598. The deliberate failure of each defendant to disclose his criminal record shows that he was not of good moral character and therefore did not meet the statutory prerequisite to citizenship. United States v. Accardo, supra; Corrado v. United States, supra.

In the Genovese case, another point raised is that Genovese's citizenship cannot be revoked on account of fraud because, even had he revealed his criminal record during naturalization proceedings, that record was such that it would not have justified a refusal of citizenship. The theory seems to be that one may deliberately engage in a falsehood concerning required facts during naturalization proceedings without fear of consequences so long as the truth, had it been revealed, would not have resulted in refusal of citizenship. The proposition has a built-in rebuttal. Mere recital of it bares its absurdity. If the government thinks it important enough to ask a question which it has authority to ask, the answer cannot be considered immaterial and meaningless. That the answer may not lead to a refusal of citizenship is not the only consideration. The government is entitled to know all the facts which it requires. We agree with what was said in Corrado v. United States, supra at page 784:

> "Upon analysis, the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship. How could any Government official or witness say whether or not citizenship would have been denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. To be awarded citizenship in the United States exacts the highest standard of rectitude. Our Government should be afforded full opportunity for investigation of the

moral character and fitness of an alien who seeks to be vested with all the rights, privileges and immunities of a natural born citizen of the United States. Where fraud has been practiced by the alien in procuring citizenship, it is not required that the Government in a denaturalization proceeding should meet the standard necessary for conviction in a criminal case. It will suffice to show that the applicant lied concerning a material fact which, if revealed, might have prevented his acquisition of citizenship."

United States v. Kessler, 213 F.2d 53 (C.A. 3, 1954), cited as support for Genovese's argument, does not help him because, in the Kessler case, this court concluded that there had not been an untruthful answer given to the question concerning arrests, and so no fraud had been committed.[3]

We have examined other questions raised. None of them are meritorious and therefore require no discussion.

For the foregoing reasons, the orders of the district courts will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[3] Much has been made of Note 9 in the Kessler case. The first part of that note said, "We have found no decision and none has been cited to us where citizenship has been revoked for failure to disclose facts the revelation of which would not have justified refusal of citizenship in the first place." That portion of Note 9 is read by Genovese to mean that one may deliberately conceal a required fact. Note 9, however, was referring to concealment of a fact which one has no duty to volunteer, *i.e.*, in Kessler, the illegal arrests. That such was the meaning of the first part of Note 9 seems clear in the context of the Kessler facts. This becomes apparent when one reads Note 9 in its entirety. That note, after the above quoted portion, refers to Note 3 in United States v. Doshen, 133 F.2d 757, 760 (C.A. 3, 1943), which opinion was written by the writer of the Kessler opinion, and in the Doshen case, Note 3 and cases cited therein make it clear that concealment of any fact properly requested by the government in naturalization proceedings constitutes a fraud.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	5
Argument	10
Conclusion	15

CITATIONS

Cases:

Brenci v. *United States*, 175 F. 2d 90	15
Corrado v. *United States*, 227 F. 2d 780	12, 15
Cufari v. *United States*, 217 F. 2d 404	13, 14
Dunlop v. *United States*, 165 U. S. 486	11
Gaglione v. *United States*, 35 F. 2d 496	15
Kay v. *United States*, 227 F. 2d 780	15
Knickerbocker Life Insurance Co. v. *Pendleton*, 115 U. S. 339	11
New York Life Insurance Co. v. *Fletcher*, 117 U. S. 519	12
Prevost v. *Morgenthau*, 106 F. 2d 330	11
Schneiderman v. *United States*, 320 U. S. 118	10
Stevens v. *United States*, 190 F. 2d 880	12
United States v. *Accardo*, 113 F. Supp. 782, affirmed *per curiam*, 208 F. 2d 632, certiorari denied, 347 U. S. 952	15
United States v. *Ascher*, 147 F. 2d 544	15
United States v. *Bischof*, 48 F. 2d 538	14
United States v. *Corrado*, 121 F. Supp. 75, affirmed, 227 F. 2d 780	12
United States v. *Saracino*, 43 F. 2d 76	15
Vourazakis, In re, 115 F. Supp. 164	14

Statutes:

Home Owners' Loan Act, 48 Stat. 134, Sec. 8 (a)	15
Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. 738 (a) (1940 ed.), Sec. 338 (a)	2
Naturalization Act of June 29, 1906, 34 Stat. 598, Sec. 1, par. Fourth	2
Naturalization Act of June 29, 1906, as amended, 44 Stat. 709, Sec. 1, par. Fourteenth	3

Miscellaneous: Page
Naturalization Regulations, issued by the Immigration and Naturalization Service, July 20, 1935 Ed., pp. 70–71, Subdivision G ---------- 4, 8, 11

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 543

VITO GENOVESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 236 F. 2d 757. The opinion of the District Court (R. 11–30)[1] is reported at 133 F. Supp. 820.

JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1956, and a petition for rehearing was denied on September 18, 1956. The petition for a writ of certiorari was filed on November 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] "R." refers to the gray Appendix for Appellant consisting of 329 pages.

QUESTIONS PRESENTED

1. Whether there was clear, unequivocal and convincing evidence that petitioner, in his naturalization proceedings, had fraudulently concealed and made misrepresentations as to a long list of conceded arrests and several misdemeanor convictions.

2. Whether knowingly false answers as to arrests and misdemeanor convictions are a sufficient ground for denaturalization.

STATUTES AND REGULATIONS INVOLVED

Section 338 (a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. 738 (a) (1940 ed.) provided as follows:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of Section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

Section 1, Paragraph Fourth, of the Naturalization Act of June 29, 1906, 34 Stat. 598, as amended, 45 Stat. 1513, in force in 1931, provided in part as follows:

> Fourth. No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five

years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Section 1, Paragraph Fourteenth, of the Naturalization Act of June 29, 1906, as amended, 44 Stat. 709, provided in part as follows:

> Fourteenth. (a) The judge of any United States District Court or the senior judge of such court if there are more judges than one is hereby authorized, in his discretion, to designate one or more examiners or officers of the Bureau of Naturalization (including the Naturalization Service) serving as such examiner or officer within the territorial jurisdiction of such court, to conduct preliminary hearings upon petitions for naturalization to such court, and to make findings and recommendations thereon. For such purposes any such designated examiner or officer is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpoena witnesses, and to administer oaths, including the oath of the petitioner to his petition and the oath of his witnesses.
>
> (b) The findings of any such designated examiner or officer upon any such preliminary

hearing shall be submitted to the court at the final hearing upon the petition required by Section 9, with a recommendation that the petition be granted or denied or continued, with the reasons therefor. Such findings and recommendations shall be accompanied by duplicate lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by the designated examiner or officer. The judge to whom such findings and recommendations are submitted shall by written order approve such recommendations with such exceptions as he may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations.

Subdivision G, Naturalization Regulations, issued by the Immigration and Naturalization Service, July 20, 1935, pp. 70–71, provided as follows:

Paragraph 1. It shall be the duty of the appropriate naturalization officers or examiners to investigate thoroughly the qualifications and eligibility of applicants for citizenship and their witnesses, and applicants for certificates of citizenship and their witnesses, to make the necessary reports of all the pertinent facts to the courts and to submit such reports as may be required to the heads of field districts or subdistricts, and to the Commissioner of Naturalization.

Paragraph 2. Wherever practicable preliminary examinations of applications for citizenship and their witnesses will be made in person. The principal purpose of such examinations is to obtain information bearing upon the appli-

cant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes. Both the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdictional requirements of law, is mentally and morally qualified for citizenship, is attached to the principles of the Constitution, and is well disposed to the good order and happiness of the United States. The question of possible arrests must be thoroughly covered. If the applicant has been arrested or charged with the violation of any law or ordinance, all the facts will be ascertained, including information as to whether conviction resulted. Particular attention must be given to the determination of the applicant's marital history and the whereabouts of his wife and minor children. The questions will be repeated in different form and elaborated until the examiner is satisfied the person being interrogated fully understands them. The witnesses shall be questioned to develop not only their own credibility and competency, but the extent of their personal knowledge or the applicant's residence, moral character, and attachment to the principles of the Constitution. Search will be made of appropriate court and other records in establishing the qualifications of the applicant and the witnesses.

STATEMENT

In a complaint under former 8 U. S. C. 738 (a) (*supra,* p. 2), filed on November 21, 1952, in the United States District Court for the District of New

Jersey, the government sought to cancel petitioner's naturalization, which had been conferred on November 25, 1936. The grounds alleged were fraudulent and illegal procurement of citizenship by reason of petitioner's falsely misrepresenting that he had had no prior arrests or convictions, and concealing such arrests and convictions (R. 1, 2–6). The District Court in a written opinion (R. 11–29; 133 F. Supp. 820) found the issues for the plaintiff and decreed petitioner's denaturalization (R. 30–31). On appeal (R. 33) the Court of Appeals unanimously affirmed (236 F. 2d 757).

Pertinent evidence adduced at the trial before the District Court (without a jury) may be summarized as follows:

Petitioner executed a Form A–2214, Application for a Certificate of Arrival-Preliminary Form for Petition for Naturalization (Govt. Ex. 1), which was received by the Immigration and Naturalization Service at New York City on March 18, 1935 (R. 324–327, 39). The answers to the questions were made in the handwriting of a person other than petitioner, but petitioner testified that he signed it in four places after it had been filled out (R. 221, 238, 239, 240, 257). Petitioner testified that this citizenship application was "about the most important thing in [his] life", but that he did not check it over at all before signing it (R. 248–249).

On December 19, 1935, preliminary immigration examiner Helen Herckt reviewed with petitioner answers to the questions on Form A–2214 (R. 73). She

was dead at the time of the trial, but government witness La Mothe, the naturalization examiner in attendance at the court hearing on November 25, 1936, when petitioner obtained his citizenship, identified her handwriting and symbols on the form, and testified as to the general procedure followed by examiners at the time when petitioner made his application (R. 45, 73, 97). Examiner Herckt also questioned petitioner's two witnesses, and indicated by the notation "N. C. R." that they had no criminal record (R. 88).

Question 31 on Form A–2214 read: "Have you ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation?" This was followed by the handwritten word "No" with a red circle around it, examiner Herckt's initials "H. H.", and the date 12–19–35 (R. 325, 84). La Mothe testified that the circle made it emphatic that the question had been asked by the examiner (R. 86).

Petitioner's criminal record showed arrests on April 22, 1918, for felonious assault (R. 152, 191); on April 25, 1924, for illegal possession of a revolver (R. 155, 176–177); on May 13, 1924, for homicide by auto (R. 156–157, 171–172); on July 25, 1925, for burglary (R. 158, 173–174, 193); on October 10, 1925, for homicide (R. 158, 159, 181); on January 17, 1925, for being a disorderly person (R. 195–196); on January 1931, for possession of concealed weapons (R. 196); on December 4, 1934, for homicide (R. 160–161, 175). In addition, he was arrested on April 15, 1917, and convicted on June 4, 1917, for illegal possession of a revolver, and sentenced to 60 days' imprisonment (R.

118); arrested, convicted, and given a suspended sentence on April 15, 1926, for contempt of court (R. 162–163, 200, 205, 206); arrested on January 29, 1927, for possession of a concealed weapon, and sentenced and convicted to 30 days' imprisonment (R. 159–160, 174).

Examiner La Mothe testified that it was the custom of preliminary examiners to ask orally Question 31 regarding arrests, and that this was required by the regulations then in effect (Subdivision G, Naturalization Regulations, issued by the Immigration and Naturalization Service, July 20, 1935, *supra,* pp. 4–5), which were read in evidence (R. 52, 54, 59–61). If it appeared from the face of Form A–2214, or as a result of the oral interrogation, that the applicant had been arrested, it was customary for the preliminary examiner to make a report of the arrests and attach it to the file for further investigation (R. 61, 62). Because of the large volume of police records in the New York metropolitan area, unless there was an indication that the alien applicant had been arrested, no check was made by the immigration officials as to arrests (R. 111, 112–113).

On the basis of the information on Form A–2214 as corrected by examiner Herckt, petitioner's Petition for Naturalization, Form A–2204–L–A (Govt. Ex. 2), was prepared (R. 64, 328–329). This form, which petitioner signed, contained the handwriting and initials of designated examiner Stitzer, who interviewed petitioner and his two witnesses (R. 329, 257, 93), as well as the handwriting and initials of examiner Herckt. Examiner Stitzer was also dead at the time of trial, but La Mothe identified his handwriting and

initials (R. 74, 97). On this Form A–2204–L–A, examiner Herckt, in a summary dated 12–19–35 under "Result of Examination", had written "NCR in or out of U. S." indicating that petitioner had no criminal record (R. 329, 91). On the same form, after the line indicating "Arrests, etc." Stitzer had written the word "No" and the date 12–19–35 (R. 97–98, 329).[2] The proceedings were adjourned by Stitzer several times during 1936, and on November 25, 1936, petitioner was finally admitted to citizenship, La Mothe being the examiner in the presence of the court at the naturalization (R. 45, 329).

At the denaturalization trial, petitioner testified that he did not remember examiners Herckt and Stitzer (R. 249, 250). He denied that he himself read, or that any immigration official ever read to him, Question 31 regarding arrests (R. 250). Petitioner testified that an unidentified immigration examiner asked if he had ever been convicted of a felony; that petitioner replied that he had had two misdemeanor convictions and an arrest; and that the official stated, "We are not interested in misdemeanors. Go ahead, sign" (R. 241–242, 256–257).

Matteo, who was one of petitioner's two witnesses at the naturalization, testified on the denaturalization trial in corroboration of petitioner that the judge or examiner did not ask petitioner the question as to whether he had had previous arrests (R. 272–273, 284–285). Matteo testified that he was not questioned

[2] The form set forth at R. 329 does not show the words "Arrests, etc.", but the testimony at R. 97–98 refers to those words.

by a woman and that no one asked if he had been arrested (R. 273). Matteo also testified that when an immigration investigator interviewed him in Naples, Florida, on December 30, 1952, he told the investigator that at petitioner's naturalization hearing he did not remember any questions being asked about whether petitioner had been arrested (R. 277–279, 308). The investigator, basing his testimony on a memorandum prepared shortly after the interview, denied that Matteo made this statement (R. 311, 312, 314, 322–323).

Four witnesses were permitted to testify as to petitioner's good reputation for truth and veracity in the community (R. 288, 293, 295, 297).

ARGUMENT

1. Petitioner's principal contention is that his denaturalization was not based upon "clear, unequivocal, and convincing evidence which does not leave the issue in doubt," the standard for denaturalization laid down by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, 158 (Pet. 5–7). The holdings by both courts below that this measure of proof was sustained by the government are fully supported by the record which contains adequate evidence to meet even the higher test for a criminal conviction.

There was adequate and clear evidence that petitioner, during the prenaturalization period, had fraudulently concealed and made misrepresentations as to a long list of arrests and several convictions. Examiner Herckt's notations on Govt. Ex. 1 (the Preliminary Form for Petition for Naturalization) dis-

closed that petitioner had answered "No" to Question 31 as to whether he had ever been arrested or charged with violation of any law of the United States, a State, or any city ordinance or traffic regulation (R. 325); and her "N. C. R." notation on Govt. Ex. 2 (the Petition for Naturalization) disclosed that petitioner had said that he had no criminal record in or out of the United States (R. 329). The word "No" after the line indicating "Arrests, etc.," written by examiner Stitzer on Govt. Ex. 2, also indicated that petitioner had given no record of prior arrests (R. 97–98). Since numerous other answers on both forms, such as those involving petitioner's family relationships, which by reason of their personal nature could have come only from him, corresponded with his general situation as disclosed by his own testimony (R. 251–256), there was adequate basis for the trial court to infer that petitioner was asked Question 31 and authorized the negative answer recorded (R. 21).

From the testimony as to the custom for both preliminary and designated examiners to question applicants for citizenship on each question and to stress particularly the question about previous arrest history (R. 48, 49, 52, 64, 65), the trial court properly found that examiners Herckt and Stitzer followed that practice in processing petitioner's papers. Cf. *Dunlop* v. *United States,* 165 U. S. 486, 494–495; *Knickerbocker Life Insurance Co.* v. *Pendleton,* 115 U. S. 339, 344–346; *Prevost* v. *Morgenthau,* 106 F. 2d 330, 333 (C. A. D. C.). The immigration regulations (*supra,* pp. 4–5; R. 60), then in effect, required that

the "question of possible arrests must be thoroughly covered"; and there is a "strong assumption that public officials have properly discharged their duties" as prescribed by statute and regulation. *United States* v. *Corrado,* 121 F. Supp. 75, 79 (E. D. Mich.), affirmed, 227 F. 2d 780 (C. A. 6).

In addition, the trial court had before it evidence that petitioner had signed Govt. Ex. 1 four times, and that he had signed after the questions were filled in (R. 240, 257). Petitioner also signed Govt. Ex. 2 (R. 257). Since he signed these documents, it is highly probable that he knew their contents (cf. *New York Life Insurance Co.* v. *Fletcher,* 117 U. S. 519), particularly in view of his testimony that his citizenship application was "about the most important thing in [his] life" (R. 248). It is not surprising that in this setting the trial court did not believe petitioner's testimony that he signed the papers without reading them (R. 248–249).

The trial court was also at liberty to disbelieve other testimony by petitioner and his witness Matteo. Cf. *Corrado* v. *United States,* 227 F. 2d 780, 782, 783 (C. A. 6); *Stevens* v. *United States,* 190 F. 2d 880, 883 (C. A. 7). Petitioner's testimony that, when he voluntarily admitted two misdemeanor convictions and an arrest, the immigration official stated he was not interested in misdemeanors (R. 256–257), was unworthy of belief. Question 31 which related even to traffic arrests clearly included arrests for misdemeanors, as well as felonies. The trial court likewise gave no credence to petitioner's denial of being questioned

as to previous arrests, in view of the government testimony as to the custom of examiners to cover this subject in accordance with the then governing regulations (R. 22).

The testimony of Matteo was unreliable. He testified that he had not been questioned about his own previous arrests, if any (R. 273), but examiner Herckt's notation "N. C. R." (no criminal record) next to Question 31 indicated that this question had been put to him (R. 88, 325). Matteo's testimony that he told an immigration investigator in Florida that at petitioner's naturalization hearing he did not remember any questions being asked about whether petitioner had been arrested (R. 277–279, 308) was contradicted by the investigator's testimony (R. 311, 312, 314, 322–323).

On the entire record, petitioner's denaturalization was warranted by clear, unequivocal, and convincing proof that he had been asked as to his arrests and convictions and had falsely replied that he had none.

2. There is no conflict between the instant case and *Cufari* v. *United States,* 217 F. 2d 404 (C. A. 1). In *Cufari,* in implying that the alien had possibly not been questioned as to previous arrests, the court observed that "in 1927 inquiry about arrests in the course of the naturalization process was not required either by statute or departmental regulation" (217 F. 2d at 409); here, the regulations specifically required that the "question of possible arrests must be thoroughly covered" (*supra,* pp. 4–5; R. 60). In *Cufari,* the court recognized that the notation "no arrests" on

the docket slip might be construed as referring to the alien's father instead of to him (217 F. 2d at 409); here, the negative answer to Question 31 referred unequivocally to petitioner alone. The court in *Cufari* characterized the information on the alien's docket slip as "brief and somewhat unclear and fragmentary notes" (217 F. 2d at 409); this is in obvious contrast to the full and complete information in petitioner's papers. These significant differences combine to show that the standard of proof for denaturalization was not met in *Cufari* but has been met in the present case.[3]

3. Petitioner also contends that his denaturalization was improper since if he had answered truthfully about his previous arrests and convictions there would still have been no bar to naturalization (Pet. 8). The contention is devoid of merit.

It is possible that, if petitioner had told the truth about his previous arrests and convictions, he might still have been naturalized. But it is also possible and perhaps more probable that a truthful admission of his record, particularly the two arrests occurring within the five-year period prior to the naturalization petition (cf. *In re Vouraxakis,* 115 F. Supp. 164

[3] Neither is there a conflict with *United States* v. *Bischof*, 48 F. 2d 538 (C. A. 2), where the denaturalization court refused to relitigate a question relating to the alien's good moral character within the five-year period, which had been in issue and had been resolved in the alien's favor by the naturalization court. In the instant case, the issue of petitioner's misrepresentations as to previous arrests had been concealed from, and was not in issue before, the naturalization court.

(M. D. Pa.); *Gaglione* v. *United States,* 35 F. 2d 496 (C. A. 1)), would have led to a thorough investigation and a finding that petitioner had not been a person of good moral character within the five-year period. The important point is that petitioner's falsehoods fraudulently deprived the government of its right to information which it properly deemed significant, and of the opportunity to investigate further. Cf. *Corrado* v. *United States,* 227 F. 2d 780, 784 (C. A. 6). As this Court said with relation to a similar claim with respect to the materiality of a false statement under Section 8 (a) of the Home Owners' Loan Act, 48 Stat. 134, in *Kay* v. *United States,* 303 U. S. 1, 5–6, "It does not lie with one knowingly making false statements with intent to mislead * * * to say that the statements were not influential or the information not important." The courts have consistently held that concealment of arrests and convictions is ground for denaturalization for fraud. *Corrado* v. *United States,* 227 F. 2d 780 (C. A. 6); *United States* v. *Accardo,* 113 F. Supp. 782 (D. N. J.), affirmed *per curiam,* 208 F. 2d 632 (C. A. 3), certiorari denied, 347 U. S. 952; *Brenci* v. *United States,* 175 F. 2d 90 (C. A. 1); *United States* v. *Ascher,* 147 F. 2d 544 (C. A. 2), certiorari denied, 325 U. S. 884; *United States* v. *Saracino,* 43 F. 2d 76 (C. A. 3).

CONCLUSION

The case was correctly decided in accordance with established legal principles, and there is no conflict

in decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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